Kentucky Law Journal

Volume 28 | Issue 3 Article 5

1940

Distribution of Property Devised or Conveyed to One and His Children

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STUDENT NOTES

DISTRIBUTION OF PROPERTY DEVISED OR CONVEYED TO ONE AND HIS CHILDREN.

When property is devised or conveyed to one and his children there arises a question as to how such property shall be distributed among the intended recipients. In such cases it is generally held that the parent takes no larger portion than does each child, and that they share in the property as joint tenants or as tenants in common.[1] Kentucky does not accord with this rule. In this state the court has held almost uniformly that in such a transfer of property by will or by deed a life estate is given to the parent with remainder in fee to the children.[2] Through a long line of decisions the Kentucky court, whether rightly or not, has failed to draw any distinction between those cases involving wills and those embracing deeds, considering them together and citing them interchangeably.[3]

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[1] Devise: Moore v. Ennis, 10 Del. Ch. 170, 87 Atl. 1009 (1913); McCord v. Whitehead, 98 Ga. 381, 35 S. E. 767 (1896); Moore v. Gary, 149 Ind. 51, 48 N. E. 630 (1897); Noble v Teeple, 58 Kan. 398, 49 Pac. 598 (1897); Hampton v. Wheeler, 99 N. C. 222, 6 S E. 236 (1898); Fitzpatrick v. Fitzpatrick, 100 Va. 552, 42 S. E. 306 (1902).

Conveyance: Moore v. Lee, 105 Ala. 435, 17 So. 15 (1894); Branham v. Day, 75 Miss. 923, 23 So. 578 (1898); Cullens v. Cullens, 161 N. C. 344, 77 S. E. 228 (1913); Fales v Curriet, 55 N. H. 392 (1875); Porter v. Lancaster, 91 S. C. 300, 74 S. E. 374 (1911).

[2] By will: Carr v. Estill, 55 Ky. (16 B Mon.) 309 (1855); Frank v. Unz, 91 Ky. 621, 16 S. W. 712 (1891); Mefford v. Dougherty, 89 Ky. 58, 11 Ky. L. Rep. 157, 11 S. W. 716 (1899); Brand v. Rodes, 17 Ky. L. Rep. 97, 30 S. W. 597 (1895); Adams v. Adams, 20 Ky. L. Rep. 655, 47 S. W. 335 (1898); Kuhn v. Kuhn, 24 Ky. L. Rep. 112, 68 S. W. 16 (1902); Sims v. Skinner, 118 Ky. 573, 81 S. W. 703 (1904); Smith v. Smith, 119 Ky. 899, 85 S. W. 169 (1905); Brock v. Brock, 168 Ky. 847, 183 S. W. 213 (1916); Lacey v. Lacey, 170 Ky. 166, 185 S. W. 495 (1916); Selman v. Livers, 229 Ky. 90, 16 S. W. (2d) 800 (1929). See: Rice v. Klette, 149 Ky. 787, 149 S. W. 1019 (1912).

By deed: Webb v. Holmes, 42 Ky. (3 B. Mon.) 404 (1843); Foster v. Shreve, 69 Ky. 519 (1869); Davis v. Hardin, 80 Ky. 672, 1 Ky. L. Rep. 165 (1880); Smith v. Upton, 12 Ky. L. Rep. 27, 13 S. W. 721 (1890); Bodine v. Arthur, 91 Ky. 53, 14 S. W. 904 (1890); Fletcher v. Tyler, 92 Ky. 145, 17 S. W. 282 (1891); Brumley v. Brumley, 28 Ky. L. Rep. 231, 89 S. W. 182 (1905); Hall v. Wright, 121 Ky. 16, 87 S. W. 1129 (1905).

[3] Brand v. Rodes, 17 Ky. L. Rep. 97, 30 S. W. 597 (1895). But see L. R. A. 1917B 50, n. 1 (the primary objective of the interpretation of a will is to accomplish the intent of the testator if it can be done without a perversion of the plain meaning of the words he used, and the intention of the devisor is not to be considered. However, in construing a deed the intention of both parties must be given equal weight, and change may be made only by joint action).

The earliest case of importance in Kentucky which bears upon the instant problem is *Webb* v. *Holmes*, decided in 1843.[4] Here was involved the construction of a deed conveying to the grantor's daughter a certain "dower in lands for the benefit of her and his (her husband's) children". The court found that although the grantor's daughter was named in the deed as the sole grantee, the grantor actually intended that the daughter's children—both those *in esse* and those later to be born—should take an interest under the conveyance. Since by the common law those not parties to a deed may not take under it a *present* interest, though they may take *in futuro*, the intent of the parties could not have been effectuated by making the daughter and her children tenants in common,[5] and the court held that a life estate should go to the grantee, with remainder to be shared by her children, both those *in esse* and those later born.[6]

After this decision came several cases applying its doctrines.[7] Some enunciated a contra theory, but these were either expressly overruled in subsequent decisions, or explained away by the court,[8] and no important departure from or addition to *Webb* v. *Holmes* was presented until *Davis* v. *Hardin*[9] was decided in 1880. This differed from the *Webb* case in that the conveyance was not to the daughter of the grantor, but to his wife and children, and it was held that the intent of the grantor could not have been to make joint tenants of the grantees because in the event of the grantor's death his bounty might pass to a stranger,[10] and in the event of a divorce and remar-

[4] 42 Ky. (3 B. Mon.) 404 (1843). Turner v. Patterson, 35 Ky. (5 Dana) 292 (1837), was decided prior to Webb v. Holmes, but is of no particular value in this discussion because the court there held that the context of the will clearly imported that a life estate was to be given to the wife with remainder to the children.

[5] Would not a shifting use have achieved the same result? Thus the estate would open to include after-born children. The property already held would shift to provide for the newly-born children, who would receive their proportionate share as a result of the use which would also spring to them as soon as they come into being.

[6] See Hall v. Wright, 121 Ky. 16, 87 S. W. 1129 (1905), which approves this doctrine as a means of allowing after-born children to take a share in their grandfather's estate, when such was clearly the intention of the testator.

[7] Carr v. Estill, 55 Ky. (16 B. Mon.) 309 (1855); Righter v. Forrester, 64 Ky. (1 Bush) 278 (1867); Foster v. Shreve, 69 Ky. 519 (1869); Koenig v. Kraft, 9 Ky. L. Rep. 945, 7 S. W. 622 (1888).

[8] Gill v. Logan, 50 Ky. (11 B. Mon.) 231 (1850) (referred to in Davis v. Hardin, 80 Ky. 672, 674, 1 Ky. L. Rep. 165 (1880); Cessna v. Cessna, 67 Ky. (4 Bush) 516 (1868) (explained as not departing from the general Kentucky rule, in Hall v. Wright, *supra*, n. 7, p. 29); Powell v. Powell, 68 Ky. (5 Bush) 620 (1869) (referred to as being erroneous in Davis v. Hardin, *supra*, p. 675).

[9] 80 Ky. 672, 1 Ky. L. Rep. 165 (1880).

[10] The reasoning of the court as used in Davis v. Hardin, *supra*, n. 10, at p. 673, is to the effect that a father making provision for his child and that child's children may well be supposed to intend that they take jointly, since they are all of his blood and the "natural objects of his bounty". However, in a conveyance from a husband to his wife and children, if it were held that they take jointly, the wife

riage of the grantor's wife, the property might pass to such stranger even as against the grantor himself. Consequently, the wife was given a life estate with remainder to the children. The holding was based primarily on the relationship between the grantor and the grantee, and the court intimated (p. 673) that had the conveyance been to the grantor's child and that child's children, it might be presumed that the grantor desired a joint tenancy. Thus the court in considering *Webb* v. *Holmes* cast a doubt upon its future adherence to that theory.

This language questioning the soundness of *Webb* v. *Holmes* was referred to and approved in *Smith* v. *Upton*,[11] though here again it was but dictum, since the case actually involved a deed to "wife and children", and was decided upon the precisely analogous *Davis* v. *Hardin*. The way was thus open for an actual repudiation of the *Webb* v. *Holmes* doctrine, at least in cases other than devises to the grantor's wife and children. But when the matter was actually presented to the court in *Bodine* v. *Arthur*,[12] involving a deed from the grantor to a stranger and his children, any question concerning the Kentucky rule was resolved when the doctrine of the *Webb* case was specifically reaffirmed.[13] Thus, unquestionably, the rule of the Kentucky court was that in the case of a will or conveyance giving property to one and his children, the parent should have a life estate and the children a remainder in fee when the intent was not shown to be otherwise.

In *Adams* v. *Adams*[14] the court advanced another ground of support for what may be termed the established Kentucky rule. There a will was involved which devised property to the testator's daughter and her children, and it was held that the daughter was entitled to a life estate in the property. The court considered the possibilities of a joint estate in the parent and children, but said that it was not to be supposed that the testator meant to give such an estate that the quantity of interest that each takes will remain uncertain and shift at the birth of each afterborn child, thus diminishing the provision made for the son or daughter.

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would receive an interest which, upon her remarriage and death, would go to her second husband—a stranger to the devisor and one whom he would not have wished to share in the proceeds of his property. The reasoning seems specious in view of the fact that this identical result is possible whenever there is a devise in fee to the wife, or whenever she receives personal property under a will and the argument set forth here is not regarded as being of any value in such cases.

[11] 12 Ky. L. Rep. 27, 29, 13 S. W. 721 (1890) (here was involved a deed from the grantor to his wife and children, so the actual question was not passed upon); see Koenig v. Kraft, 9 Ky. L. Rep. 945, 947, 7 S. W. 622 (1888). *Cf.* Bullock v. Caldwell, 81 Ky. 566, 5 Ky. L. Rep. 576 (1884) (where the plain language of the deed showed an intention to make the parent and her children joint tenants).

[12] 91 Ky. 53, 14 S. W. 904 (1890).

[13] The fact that the conveyance here was to a stranger makes the rejection of the dictum of Davis v. Hardin, *supra* n. 9, even more forceful, since the court in that case intimated that the only possible reason for finding a joint tenancy was the relationship of husband and wife.

[14] 20 Ky. L. Rep. 655, 47 S. W. 335 (1898).

Since these adjudications the Kentucky holding has not been altered. A number of cases have been decided,[15] the majority of which involve wills devising property to the testator's wife and children, but no contradictory or inconsistent view has been taken.

As has been stated, the generally accepted view is opposed to the Kentucky holding, and in such cases the wife and children take as joint tenants in the property.[16] This doctrine, in regard to both wills and deeds, probably is based on *Wild's Case*,[17] which has been accepted as standing for two propositions:

1. If there is an immediate devise to A and his children and A has no children, the will is construed as creating an estate tail in A.[18]
2. If A has children, A and his children take as joint tenants for life.[19]

The interpretation of *Wild's Case* is based upon the idea that the testator intended to transfer a *present* interest (i. e., "an immediate devise") and the courts attempt to effectuate such a presumed intention. But does it necessarily follow from language analogous to "to A and his children" that the testator intended to transfer a present interest? Mr. Simes in his work on Future Interests does not agree with such a construction. He says:

> "And, while the language, if taken literally, indicates an immediate gift, it seems that in most cases the testator's wishes would be best effectuated by construing the limitations as creating a life estate in A with remainder in his children."[20]

Several factors may be considered in supporting this view. *First*, in a devise from a husband to his wife and their children or in the case of a devise from a father to his child and that child's children (the testator's grandchildren), the relationship of the testator, in the one case to the wife and in the other to the child, is closer than the affinity with the children or grandchildren respectively, and it seems reasonable that he would wish to make provision for them before the others, but not necessarily to their exclusion. *Second*, where the devise is to the testator's wife and children, particular regard would naturally be had to providing for the wife in her old age. A life estate only would better insure this objective because there would be much less danger of the wife's losing her share, and she would be better provided for throughout her life. *Third*, a testator devising property to his child and that child's children would naturally wish to make pro-

[15] See cases cited in note 2, *supra*.

[16] See cases cited in note 1, *supra*.

[17] 6 Coke 16b, 77 Eng. Reprint 277 (1599). That these decisions are founded on *Wild's Case*, see L. R. A. 1917B 50, n. 4, *et seq.*

[18] 3 *Jarman on Wills* (7th ed., 3 vols. 1930) 1864.

[19] *Jarman, op. cit. supra* n. 18, p. 1869.

[20] 2 *Simes, Law of Future Interests* (3 vols. 1936) 202. In this connection see: In re Jones, L. R. (1910) 1 Ch. (Eng.) 167; Faribault v. Taylor, 58 N. C. 219 (1859); Noe v. Miller, 31 N. J. Eq. 234 (1879).

vision for them all, and not merely for those in being to the exclusion of those later to be born.

For these reasons, it is believed that it is not correct to make the simple statement, as interpreted from *Wild's Case*, that the testator intended to pass a present interest, but that it is more in accord with his probable meaning to say that he intended that both the parent and children should receive a present interest, but that the enjoyment in possession as regards the children should arise *in futuro*.

But there is a very conclusive reason why *Wild's Case* should not be followed by the Kentucky court. It is evident from that decision that the first rule therein was adopted for the purpose of giving effect to the presumed intention of the testator that afterborn children should share in the estate, when there was no other way in which that could be accomplished, and in order to carry this intent, it was held that a fee tail was passed by the will. However, since 1796 the fee tail has been abolished in Kentucky and replaced by a fee simple.[21] Accordingly, if *Wild's Case* were followed, the parent would take a fee simple, with the result that the very purpose which motivated the court in *Wild's Case* (i. e., a desire to effectuate as nearly as possible the testator's intention) would not be achieved. The children would get nothing. Hence the court was obliged to find some other method of distributing the property which would as nearly as possible accomplish the testator's objective. This it has done by giving a life estate to the parent with remainder to his children.[22]

Referring again to *Wild's Case*, it is seen that a wide distinction is drawn between propositions one and two as to whether or not the children are then *in esse*. Mr. Simes criticizes this distinction:

> ". . . the wide difference in the solution suggested in *Wild's Case* where there are and where there are not children seems artificial in the extreme. Either the testator would intend the children of A to take concurrently with him (A) or in succession after him . . . and the time at which they are born would be of no effect. . . ."[23]

Since the question of after-born children will not be presented in a devise to the testator's wife and children, such an issue will arise only when the devise is to the testator's child and that child's children. It is certainly reasonable to suppose, in the absence of any evidence to the contrary, that the testator intended that all of his grandchildren should share in the bequest, and not merely those *in esse*. It is believed that Simes criticism is sound.[24]

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[21] Carroll's Kentucky Statutes (1936), sec. 2343. Act approved Dec. 19, 1796. 1 Litt. Laws 567, sec. 10.

[22] See Turner v. Ivie, 5 Heisk (Tenn.) 222 (1871) (in view of the abolition of estates tail in Tennessee the rule of Wild's Case should no longer be recognized as a rule of testamentary construction). To like effect see Carr v. Estill, 55 Ky. (16 B. Mon.) 309 (1855).

[23] Simes, *op. cit. supra* n. 20, p. 203.

[24] Cases which accord with this view are: Carr v. Estill, 55 Ky. (16 B. Mon.) 309 (1855); Righter v. Forrester, 64 Ky. (1 Bush) 278 (1867); Hall v. Wright, 121 Ky. 16, 81 S. W. 1129 (1905); Chambers

The Kentucky court apparently has seen the reasons against attempting to effectuate the testator's intention in this jurisdiction by an application of the rule of *Wild's Case* and has consistently held that a life estate should go to the parent with remainder to his children.[25] In situations analogous to the first proposition in that case this is logical, for the children are not in being and the fee tail of *Wild's Case* cannot be effectuated in this state. The supposed intention of the testator is secured under the Kentucky holding, while it could not be achieved by an application of the principles of *Wild's Case.*

In situations similar to proposition two, the court's holdings have been consistent with its decisions under the first rule. If Simes is correct in his criticism of the distinction between situations in which there are children and those in which there are none *in esse* at the time of the testator's death, then that is another reason for refusing to follow *Wild's Case.* But what is more important is that in Kentucky a fee simple is presumed where there is any doubt as to the quantity of the estate to be taken, thus giving A and his children a joint tenancy in fee simple instead of a joint tenancy for life as in *Wild's Case.* The court has rejected this alternative as not being in accord with the testator's intention, because he would never have meant to give in such a manner that the exact estate which each would hold would be so uncertain. Thus the Kentucky court's interpretation of situations similar to proposition two of *Wild's Case* is no less logical than the one there embodied.

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GROUNDS FOR DISBARMENT AND SUSPENSION IN KENTUCKY.

The Court of Appeals has often stated that suspension and disbarment are not means of punishment, but are designed to protect the bar and the court and to promote the administration of justice.[1] How-

v. Union Trust Co., 235 Pa. 610, 84 Atl. 512 (1912) (stating that the second proposition in Wild's Case is not law in Pa.); Keown's Estate, 238 Pa. 343, 86 Atl. 270 (1913); Scruggs v. Mayberry, 135 Tenn. (8 Thomp.) 586, 188 S. W. 207 (1916).

[25] See cases cited, *supra,* note 2.

[1] Baker v. Commonwealth, 73 Ky. 592 (1874): "it would be unjust to the profession, . . . and a disregard of public welfare to permit an attorney who has forfeited his right to public confidence to continue (to practice)"; Chreste v. Commonwealth, 178 Ky. 311, 198 S. W. 929, 933 (1917): "It is recognized that . . . (disbarment) . . . is not in its nature a punishment . . . but is inflicted with a view of purifying and maintaining the high standard for integrity so essential to the office of attorney at law"; Accord: Lenihan v. Commonwealth, 165 Ky. 93, 176 S. W. 948, 955 (1915): "The purpose of disbarment is not to punish the attorney, but to protect the court and the administration of justice . . ." Commonwealth v. Porter, 242 Ky. 561, 46 S. W. (2d) 1096, 1097 (1932): "The purpose of a disbarment proceeding is not to punish the attorney but to protect the court in the administration of justice." For general treatment of the subject of this note see: Warvelle, Legal Ethics (1902) secs. 65, 68, 69, 73, 74; Cohen, The Law: Business or Profession? (1924), pp. 1–23; Bolts, Ethics for Success at the Bar (1928) pp. 17–37; Brown, Lawyers and the Promotion of Justice (1938) pp. 210–215.